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**IN THE
COURT OF APPEALS OF INDIANA**

DANIEL A. JOHNSON,
Appellant-Defendant,

VS.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 29A04-0807-CR-431

APPEAL FROM THE HAMILTON SUPERIOR COURT
The Honorable Daniel Pfleging, Judge
Cause No. 29D02-0601-FC-6

October 31, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Daniel Johnson appeals his conviction for battery as a class C felony.¹ Johnson raises two issues, which we revise and restate as:

- I. Whether Johnson’s fundamental rights under Article 1, Section 13 of the Indiana Constitution were violated when the trial court replayed a witness’s testimony in the courtroom without Johnson being given notice or an opportunity to be present; and
- II. Whether there was sufficient evidence to convict Johnson of battery as a class C felony.

On cross appeal, the State raises one issue, which we restate as whether the trial court abused its discretion by allowing Johnson to file a belated notice of appeal. We dismiss.

The relevant facts follow. On the evening of December 13, 2005, C.J. was alerted by the barking of her dog. C.J. saw Johnson on the back porch yelling and asking for Mike Mosier. C.J. told Johnson that Mosier was not there, that he did not live there, and asked Johnson to leave. Johnson took off his shirt in a way that was “aggressive” towards C.J. Transcript at 56. At this point, Johnson was wearing only a pair of shorts.

C.J. went inside her house to get her father, Orville Wayne Jones (“Wayne”). Wayne went outside and asked Johnson what he needed. Johnson told Wayne that he was looking for Mike Mosier or C.J.’s brothers. Wayne told Johnson to leave, but Johnson “[w]anted to sit there and argue” with Wayne. *Id.* at 123. Wayne told Johnson to leave again, and Johnson “[s]at there and stared at [Wayne] for a long time and kind of

¹ Ind. Code § 35-42-2-1 (Supp. 2005) (subsequently amended by Pub. L. No. 99-2007, § 209 (eff. May 2, 2007); Pub. L. No. 164-2007, § 1 (eff. July 1, 2007)).

got agitated, started swaying back and forth more.” Id. Wayne again told Johnson to leave, but Johnson came closer and “got up pretty close to the step of the porch.” Id. at 124. At this point, Wayne saw Matt Cleary and Jeremiah Cleary crouching down behind his truck. Johnson then grabbed Wayne by the arm. Wayne hit Johnson because he felt threatened. Someone then hit Wayne in the back of the head. Johnson, Matt, and Jeremiah “beat up” Wayne by kicking him and hitting him with a baseball bat. Id. at 128. Someone hit Wayne’s ankle with a baseball bat, and Wayne suffered a fractured ankle. Eventually, two of the attackers left, and Johnson went back and hit Wayne one more time with the baseball bat. After the attack, Wayne was “horribly messed up” and in a “lot of pain.” Id. at 59, 148. Wayne suffered a “big knot” on the back of his head, bruises, cuts, and a fractured right ankle. Id. at 136.

The State charged Johnson with Count I, battery by means of a deadly weapon as a class C felony; and Count II, criminal recklessness resulting in serious bodily injury as a class C felony. During the jury trial, Winston Bostic, Wayne’s neighbor, testified that he witnessed the fight. During jury deliberations, the jury requested a transcript of Bostic’s testimony. Johnson’s attorney argued that the jury did not state that there was a disagreement and, without a disagreement, it would unduly highlight a portion of the testimony. The trial court asked the jury why they needed a transcript and they responded: “The reason for the request is that the instructions instruct us to use the most meaningful pieces of evidence. As a jury, we decided the testimony of Winston Bostic is

the most meaningful piece of evidence. We think it makes the most sense to see this testimony in writing to ensure our accuracy of the evidence presented.” Id. at 302-303. Johnson’s attorney repeated his argument that the jury did not state that they had a disagreement. The trial court asked the jury foreman whether the jurors had reached a disagreement, and the foreman said, “Yes.” Id. at 307. The trial court then replayed Bostic’s testimony.

The jury found Johnson guilty of Count I, battery by means of a deadly weapon as a class C felony and not guilty of the remaining charge. On February 13, 2008, the trial court sentenced Johnson to six years, which included two years suspended, two years in the Indiana Department of Correction, and two years on Hamilton County Community Corrections Work Release. The trial court also informed Johnson of his right to appeal and informed him that he “must file . . . a Notice of Appeal . . . within 30 days of today’s date.” Id. at 343. On March 26, 2008, the trial court entered an order titled “Nunc Pro Tunc,” which granted Johnson leave to file a belated appeal. That same day, Johnson filed a belated notice of appeal.

We first address the State’s cross appeal issue because if it has merit, it would be dispositive of Johnson’s claims. The issue is whether the trial court abused its discretion by allowing Johnson to file a belated notice of appeal. At the outset we note that Johnson did not respond to the State’s allegation on cross appeal. In such a circumstance, we may reverse if we find *prima facie* error. Townsend v. State, 843 N.E.2d 972, 974 (Ind. Ct.

App. 2006), trans. denied. Prima facie is defined as “at first sight, on first appearance, or on the face of it.” Id.

Ind. App. Rule 9(A)(1) provides that “[a] party initiates an appeal by filing a Notice of Appeal with the trial court clerk within thirty (30) days after the entry of a Final Judgment.” Ind. App. Rule 9(A)(5) provides that “[u]nless the Notice of Appeal is timely filed, the right to appeal shall be forfeited except as provided by P.C.R. 2.” Johnson was sentenced on February 13, 2008, and he filed his notice of appeal on March 26, 2008, twelve days after the thirty-day deadline had passed. Therefore, Johnson forfeited his appeal, unless it is salvaged by Ind. Post-Conviction Rule 2. See Davis v. State, 771 N.E.2d 647, 648-649 (Ind. 2002) (holding that defendant forfeited his appeal by failing to file a notice of appeal within thirty days of the final judgment unless Post-Conviction Rule 2(1) salvaged his appeal).

Ind. Post-Conviction Rule 2 permits a defendant to seek permission to file a belated notice of appeal and provides:

An “eligible defendant” for purposes of this Rule is a defendant who, but for the defendant’s failure to do so timely, would have the right to challenge on direct appeal a conviction or sentence after a trial or plea of guilty by filing a notice of appeal, filing a motion to correct error, or pursuing an appeal.

Section 1. Belated Notice of Appeal. Where an eligible defendant convicted after a trial or plea of guilty fails to file a timely notice of appeal, a petition for permission to file a belated notice of appeal for appeal of the conviction may be filed with the trial court, where:

- (a) the failure to file a timely notice of appeal was not due to the fault of the defendant; and
- (b) the defendant has been diligent in requesting permission to file a belated notice of appeal under this rule.

The trial court shall consider the above factors in ruling on the petition. . . .

If the trial court finds grounds, it shall permit the defendant to file the belated notice of appeal, which notice of appeal shall be treated for all purposes as if filed within the prescribed period.

“The trial court is to permit a belated appeal only if it concludes that the failure was not ‘due to the fault of the defendant’ and the defendant was ‘diligent’ in requesting to file permission to file a belated notice of appeal.” Gutermuth v. State, 868 N.E.2d 427, 429 (Ind. 2007).

Here, Johnson did not file a petition to file a belated notice of appeal. Rather, the trial court entered the following order:

Nunc Pro Tunc

The Court after reviewing the Sentencing Order of 2/13/08, now notes that the defendant was advised of his appellate rights and the Court appointed Lawrence Newman as Appellate [sic] counsel. Further, the Court now gives leave to Lawrence Newman to file a Belated Appeal on behalf of the Defendant.

Appellant’s Appendix at 146.²

² We note that the trial court’s order was titled, “Nunc Pro Tunc.” Appellant’s Appendix at 146. “A nunc pro tunc entry is defined in law as ‘an entry made now of something which was actually previously done, to have effect as of the former date.’” Cotton v. State, 658 N.E.2d 898, 900 (Ind. 1995) (quoting Perkins v. Haywood, 132 Ind. 95, 101, 31 N.E. 670, 672 (1892)). Such an entry may be used to either record an act or event not recorded in the court’s order book or to change or supplement an entry

Because Johnson did not file a petition to file a belated notice of appeal, he did not satisfy the requirements of Ind. Post-Conviction Rule 2. Thus, we dismiss Johnson's appeal. See Witt v. State, 867 N.E.2d 1279, 1281 (Ind. 2007) (dismissing the appeal where the defendant failed to satisfy the requirements of Post-Conviction Rule 2(1)); Townsend, 843 N.E.2d at 975 (dismissing the defendant's case and holding that the trial court erred when it granted defendant's petition to file a belated notice of appeal); Davis, 771 N.E.2d at 648-649 (holding that a defendant forfeited his right to appeal, when he filed his Notice of Appeal after the thirty-day deadline and did not seek relief under Post-Conviction Rule 2).

For the foregoing reasons, we dismiss Johnson's appeal.

Dismissed.

BAKER, C. J. and MATHIAS, J. concur

already recorded in the order book. Id. Its purpose is to supply an omission in the record of action really had, but omitted through inadvertence or mistake. Id. Here, the trial court's March 26, 2008 order did not constitute a nunc pro tunc order.